BALBIR SINGH CHANAN SINGH A

v.

THIRUNAUGARASU MUTHUSAMY & ANOR

HIGH COURT MALAYA, IPOH B
CHOONG SIEW KHIM JC
[CIVIL APPEAL NO: 12-50-2008]
3 MAY 2010

DAMAGES: *Quantum - Appeal against - General and special damages - Road accident - Personal injuries - Fractures - Scarring - Medical charges from private hospital - Cost of future surgery - Loss of earnings - Multiplicand and multiplier, whether correctly decided* C

The respondents - as a result of a road accident involving the appellant - were ordered to pay the appellant general and special damages as follows: (i) RM15,000 for closed fracture of right femoral condyle; (ii) RM20,000 for compound grade II (2) comminuted fracture of left tibia/fibula; (iii) RM8,000 for avulsion fracture of left posterior cruciate ligament; (iv) RM10,000 for scarring; (v) RM1,218 for medical charges from a private hospital (Hospital Fatimah), which was 1/3 of the amount claimed by the appellant; (vi) RM3,000 for future surgery to remove implants; and (vii) RM4,500 for loss of earnings, calculated at RM1,500 for a period of three months. The appellant appealed against the quantum awarded, alleging, *inter alia*, that he was entitled to: (a) at least RM30,000 under Issue (i) as there was 1cm shortening to his right limb; (b) the full amount of RM3,655 under Issue (v); and (c) loss of earnings for three years under Issue (vii) as he, a transporter prior to the accident, was unable to drive a lorry. D E F G

Held (allowing the appeal in part):

(1) The SCJ, on the facts, did not err in any way by consequently deciding that the appellant did not suffer from 1cm shortening as a result of the fracture. She had, however, overlooked that there was a valgus deformity of the right knee and the range of movement in the right knee was 25% less than the left in flexion. Hence, a higher award was fair and more consistent with these residual disabilities suffered by the appellant. The award of RM15,000 was increased to and substituted with the sum of RM20,000 in the circumstances. (para 8) H I

(2) In respect of Issues (ii) and (iii), there was no convincing reason and basis for this court to disturb the amounts awarded. As for Issue (iv), the award of RM10,000 was a fair and reasonable sum for the nine scars suffered by the appellant on his two limbs. (paras 9-11)

(3) It was beyond comprehension that the appellant expected to be awarded the total amount incurred for his treatment at Hospital Fatimah when his initial admission and subsequent treatment at Hospital Ipoh had involved the internal fixing of his fractures. He discharged himself at his own risk after which he chose to be admitted to Hospital Fatimah where he was merely put on physiotherapy exercises. There was no record of any other medical treatment given to him at Hospital Fatimah, and there was no evidence that the physiotherapy treatment was not available or adequate at Hospital Ipoh. The SCJ had not erred in awarding 1/3 of the whole. (para 12)

(4) With regard to Issue (vi), two medical doctors came up with different estimated costs for the removal of the metal implants in the right femoral condyle and left tibia/fibula. The SCJ was correct in awarding the lower of the two, being the more reasonable of the two charges. (paras 13 & 14)

(5) The appellant had, on the facts, failed to prove, on a balance of probabilities, that he was not able to and did not drive any lorry since the accident, thus depriving him of the usual income that he earned prior to the accident. His assertion of loss of earnings, being unsubstantiated, remained a mere allegation that did not allow the Sessions Court to award loss of earnings for three years after the accident and continuous partial loss of earnings thereafter. (para 22)

(6) The SCJ had properly evaluated the evidence adduced by both parties before concluding that the appellant had resumed work three to four months after the accident. The multiplicand, on the relevant evidence, was also correctly decided. The multiplier, however, ought to have been four months instead of three. Therefore, the award for loss of earnings was increased from RM4,500 to RM6,000. (paras 23 & 24)

Case(s) referred to:
Engketeramana R v. Zulkifly Johari Mallals Digest 1024
Hee Beng Sim v. Lim Seng Khuan Mallals Digest 1747
Letchumiah Aplasamy v. Mara Express Mallals Digest 682

For the appellant - Saranjit Singh; M/s Saranjit Advocs
For the respondent - YK Cheong; M/s Loh & Assoc

Reported by Suresh Nathan

JUDGMENT

Choong Siew Khim JC:

[1] The appellant (Balbir Singh a/l Chanan Singh) was the plaintiff in civil suit 53-276-2002 arising from an accident between motorcycle ADS 8130 (of which he was the pillion-rider) and motorcar ADR 73 driven by the second defendant. The motorcyclist was brought in as the third party by the two defendants (respondents in this appeal). The learned Sessions Court Judge found the respondents 25% and the third party 75% liable for causing the accident.

[2] On the basis of 100% liability, the respondents were ordered to pay the appellant general and special damages as follows (ie, items relevant to the appeal):

(A) General Damages

(i)	Closed fracture of right femoral condyle	– RM15,000
(ii)	Compound grade II (2) comminuted fracture of left tibia/fibula	– RM20,000
(iii)	Avulsion fracture of left posterior cruciate ligament	– RM 8,000
(iv)	Scars	– RM10,000

(B) Special Damages

(i)	Future surgery for removal of implants	– RM 3,000
(ii)	Medical bill from private hospital (Hospital Fatimah)	– RM 1,218
(iii)	Loss of earnings at RM1,500 for three months	– RM 4,500

[3] For item B (ii), the appellant claimed a total of RM3,655 for medical charges by Hospital Fatimah. The Sessions Court Judge however allowed a sum of RM1,218 which was 1/3 of the amount claimed.

[4] The appellant, being dissatisfied with the amounts given for the above items of general and special damages, appealed against quantum only.

Closed Fracture Right Femoral Condyle

[5] The bone of contention was whether there was 1cm shortening arising from this fracture which affected the amount allowable as a result of this residual disability. The appellant contended there was 1cm shortening to his right limb whereas the respondents claimed there was none. The appellant relied on two specialist reports by Dato' Dr. K.S. Sivananthan of Hospital Fatimah. These two reports by the same specialist were contradictory, one dated 29 May 2001 (P10) stating that both lower limbs were of equal length (see p. 103 of the appeal record) whilst the other dated 5 June 2003 (P11) specifically referred to an impairment of 1cm shortening in the right lower limb (see p. 114 of the appeal record). The accident occurred on 11 September 1999.

[6] Dr. N. Prasad who examined and reassessed the appellant at the behest of the respondents on 4 August 2005 found that there was no real shortening of his right or left lower limb apart from his finding that the appellant was still unable to squat and tended to limp when walking (see p. 364 of appeal record). All the fractures have also united in good position and this was in consonance with Dato' Dr. K.S. Sivananthan's finding that the fractures have united (p. 114 of the appeal record).

[7] At this appeal, the appellant submitted that he was entitled to at least RM30,000 for this head of injury. He relied on cases referred to at the Sessions Court.

[8] The Sessions Court Judge had considered the three specialist reports but went on to accept that D25 (Dr. N. Prasad's report) was more accurate and current due to the inconsistent and conflicting findings of the appellant's own specialist with regard to the issue of shortening. In other words, she found it safe to rely on D25 than on P10 or P11. She hence found that the fracture of the right femoral condyle did not

contribute to or cause any shortening. In my opinion, she did not err in any way by consequently deciding that the appellant did not suffer from 1cm shortening as a result of the fracture, but was the sum of RM15,000 appropriately and reasonably awarded when a closer perusal of D25 revealed that there was a valgus deformity of the right knee and range of movement in the right knee was 25% less than the left in flexion apparently arising from this head of injury. It is my view that the Sessions Court Judge had clearly overlooked this and I am hence inclined to find that a higher award is fair and more consistent with these residual disabilities suffered by the appellant. The award of RM15,000 is increased to and substituted with the sum of RM20,000 in the circumstances.

Compound Grade 2 Comminuted Fracture Of Left Tibia/ Fibula

[9] For this injury, I find that the Sessions Court Judge had considered the cases relied on by the appellant (*Letchumiah Aplasamy v. Mara Express* Mallals Digest no. 682 and *Engketeramana R. v. Zulkifly bin Johari* Mallals Digest 1024) and viewed the higher amounts awarded due to more serious residual disabilities suffered by the plaintiffs in those cases. D25 did not reveal similar disabilities or any obvious disability arising from this fracture. There is therefore no convincing reason and basis for me to disturb the amount of RM20,000 allowed by her under this item.

Avulsion Fracture Of Left Posterior Cruciate Ligament

[10] The trial judge was guided by and had considered the authority cited by learned counsel for the appellant (*Hee Beng Sim v. Lim Seng Khuan* Mallals Digest 1747) before awarding RM8,000 for this injury. At this appeal, the same counsel failed to submit on what basis this award was manifestly low to allow this court to disturb it.

Scars

[11] I am inclined to agree with the respondents that the award of RM10,000 is a fair and reasonable sum for the nine scars suffered by the appellant on his two limbs.

Private Hospital Medical Charges

[12] It is beyond comprehension that the appellant could expect to be awarded fully the total amount incurred for his treatment at Hospital Fatimah when his initial admission and subsequent

treatment at Hospital Ipoh had involved the internal fixation of his fractures. On 20 September 1999 he discharged himself at his own risk (see p. 91 of appeal record) after which he chose to be admitted to Hospital Fatimah where he was merely put on physiotherapy exercises to increase the range of movements in his knee joints (see p. 111 of appeal record). There was no record of any other medical treatment given to him at Hospital Fatimah. There was no evidence that the physiotherapy treatment at Hospital Fatimah was not available or adequate at Hospital Ipoh. The Sessions Court Judge had not erred in awarding 1/3 of the whole.

Cost Of Future Surgery

[13] Contrary to Dato' Dr. K.S. Sivananthan's estimate of RM4,500 as costs for the removal of the metal implants in the right femoral condyle and left tibia/fibula (see p. 105 appeal record), such removal surgery according to Dr. N. Prasad will cost RM3,000 with two days' hospitalization as both surgeries can be done at the same time (see p. 364 appeal record).

[14] The Sessions Court was correct in awarding the lower of the two being the more reasonable charge.

Loss Of Earnings

[15] There was no dispute that prior to the accident the appellant was a transporter who owned lorry ACW 1660. The appellant claimed his net earnings per month then was RM6,000 - RM7,000 after deducting petrol and maintenance costs.

[16] He testified in chief that following the accident, he did not work for three years as he was not able to drive a lorry. After those three years, he worked as a security guard with his father on a much reduced salary of RM600 a month.

[17] In cross-examination he said he still owned the lorry and he did not employ anyone to run his transport business. He however later revealed that he had given the lorry to his brother to continue with the business but he did not pay wages to his brother.

[18] In re-examination, he again somewhat changed his testimony by stating that the profits were taken by his brother as the lorry was sold to him. Over and above his less than credible evidence on this matter, the appellant when asked in cross-examination

about summonses issued against him after the accident explained that this was because his brother had used his driving licence and permit to drive the lorry thus implying that his brother was the one who drove the lorry when the summonses were issued.

[19] In re-examination, he clarified that the summonses were issued in his name as the permit was in his name.

[20] Rebuttal evidence was adduced by the defendants through SD1 that summonses (D27A-J) were issued to the appellant for various traffic offences, the earliest dated 27 January 2000 (D27A) which was just over four months after the accident on 11 September 1999. SD1 confirmed that these summonses were issued in the name of the appellant who was stopped by the police and required by the police to show his identity card before the issuance of the summonses. SD1 disagreed that someone else had used the identity card and licence of the appellant during the commission of those traffic offences.

[21] SD2 testified that the appellant's GDL (licence for transporting goods) expired on 16 June 1999 and was not renewed as of 11 September 1999 on the day of accident. It was only renewed on 19 January 2000 and valid for one year. Every renewal required medical examination of the GDL holder to ascertain his health condition before renewal was approved.

[22] It is pertinent to note that the appellant did not call his brother to corroborate his testimony and contention that the summonses were issued when it was his brother and not him who drove his lorry. He had failed in this way to prove that he was unable to and did not drive any lorry four months after the accident. The appellant's brother would be the only and best person to refute the defendants' stand that the summonses were issued to the appellant when he was the driver. I noted that the appellant merely opted not to call his brother for reasons only best known to himself when in fact it was imperative that he be called. Whether he was available or not was another issue. The appellant also did not call his father to establish his claim that he worked as a security guard three years after the accident that earned him a salary of RM600 per month. He obviously failed to discharge the onus that was upon him to prove, on a balance of probabilities, that he was not able to and did not drive any lorry since the accident thus depriving him of the usual income that he earned prior to the accident. His assertion of loss of earnings being unsubstantiated remained a mere allegation that did not

allow the Sessions Court to award loss of earnings for three years after the accident and continuous partial loss of earnings thereafter.

[23] As such, I find from her grounds of judgment that the Sessions Court Judge had properly evaluated the evidence adduced by both parties when she concluded and found that the appellant had resumed work three to four months after the accident. The summons D27A was obviously issued just over four months subsequent to the accident and based on this, the Sessions Court Judge in my opinion ought to have allowed loss of earnings for four months instead of three months being the multiplier.

[24] Be that as it may, the trial judge assessed the multiplicand at RM1,500 despite the appellant's testimony at p. 39 of the appeal record that his income was RM10,000 to RM12,000 a month that he earned by transporting goods for two companies Lean Loong Enterprise and Yong Fu Xing Sdn. Bhd. The appellant called two witnesses to prove his earnings. SP4 from Yong Fu Xing Sdn. Bhd. testified that the appellant's average monthly income as his company's transporter was in the region of RM2,000 with reference to vouchers P22 (1-94) and letter of confirmation P17. SP5 from Lean Loong Enterprise signed P16 that showed freight charges paid to the appellant by his company in 1999. Notwithstanding this, he said that vouchers, P24 (A-Q), were issued for 1996 and 1997. There were no vouchers for the year 1999 and according to him, that meant that the appellant did not provide services to his company in that year. SP5 went on to agree in cross-examination that the appellant transported goods for his company in 1996 and 1997 only and none for the following year until 1999. SP5's equivocal evidence was not convincing and credible and on this basis the Sessions Court Judge was therefore correct in accepting SP4's evidence when finding that the appellant only transported goods for Yong Fu Xing Sdn. Bhd. before the accident. She had considered the relevant evidence before deciding on the multiplicand. However based on what was stated earlier, the multiplier ought to be four months. Hence loss of earnings for three months is substituted with loss of earnings for four months amounting to RM6,000.

[25] The appeal is allowed with costs only to the extent as stated above.